(16)

No. 95-1872

In The

Supreme Court of the United States

October Term, 1996

THE HONORABLE WILLIAM STRATE, Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation; THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION; LYNDON BENEDICT FREDERICKS; KENNETH LEE FREDERICKS; PAUL JONAS FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB PIUS FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. ABSENT EXPRESS DIVESTMENT BY CONGRESS, THE TRIBE RETAINS INHERENT CIVIL JURISDICTION OVER THE CONDUCT OF NON-INDIANS ON INDIAN LAND 1

A. A Federal Grant of an Easement on Indian Trust Land to a State for Highway Purposes Does Not Divest Tribal Jurisdiction over Tortious Conduct by Non-Indians on the Highway 2

B. The Tribe's Treaties and Agreements with the United States do not Divest Tribal Civil Jurisdiction over Non-Indian Conduct on the Reservation 5

II. ALTERNATIVELY, EVEN IF THE SITE OF THE ACCIDENT WERE NOT INDIAN LAND, THE TRIBE RETAINS ADJUDICATORY JURISDICTION OVER THIS CASE 7

A. The Tribe Has Adjudicatory Jurisdiction over the Case Whether or Not it may Impose Tribal Law as the Substantive Rule of Decision 8

B. The *Montana* "Tribal Interest Test" Standing Alone Justifies the Tribal Court's Exercise of Adjudicatory Jurisdiction in the Case 11

C. Concerns for Judicial Economy Compel Upholding Tribal Adjudicatory Jurisdiction .. 15

TABLE OF CONTENTS – Continued

Page

III. THE INDIAN CIVIL RIGHTS ACT, THE PLENARY POWER OF CONGRESS, AND PRINCIPLES OF COMITY ASSURE THAT TRIBAL COURTS WILL ACT FAIRLY 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Alyeska Pipeline Service Co. v. Kluti Kaah Native Village, ___ F.3d ___, 1996 WL 668487 (9th Cir. 1996) 4

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) 10

Brendale v. Confederated Tribes and Bands, 492 U.S. 408 (1989) ..... *passim*

Burlington Northern R.R. Co. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992) 4

Burnham v. Superior Court, 495 U.S. 604 (1990) 10

Buttz v. Northern Pacific R.R. Co., 119 U.S. 55 (1886) 3

Confederated Tribes v. Washington, 938 F.2d 146 (9th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992) 14

County of Yakima v. Confederated Tribes and Bands, 502 U.S. 251 (1992) 4, 7

Duro v. Reina, 495 U.S. 676 (1990) 9

Fredericks v. Eide-Kirschmann Ford, 462 N.W.2d 164 (N.D. 1990) 19

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 12

Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) ..... *passim*

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 3, 4, 7, 13, 14

Montana v. United States, 450 U.S. 544 (1981) .... *passim*

TABLE OF AUTHORITIES – Continued

Page(s)

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985) 5, 8, 9, 11, 17

Nevada v. Hall, 440 U.S. 410 (1979) 11

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 2

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 6, 9

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) .. 10, 12

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ... 17, 18

South Dakota v. Bourland, 508 U.S. 679 (1993) 3, 7, 9, 11, 13

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 5

Tafflin v. Levitt, 493 U.S. 455 (1990) 10

Testa v. Katt, 330 U.S. 386 (1947) 10

Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138 (1984) 6

United States v. Soldana, 246 U.S. 530 (1918) 3

United States v. Wheeler, 435 U.S. 313 (1978) 6

Washington v. Confederated Tribes, 447 U.S. 134 (1980) 2

Williams v. Lee, 358 U.S. 217 (1959) 8, 9, 11

Wilson v. Marchington, 934 F. Supp. 1187 (D.Mont. 1996), *appeal docketed*, No. 96-35145 (9th Cir. Jan. 30, 1996) 20

TABLE OF AUTHORITIES – Continued

Page(s)

TREATIES, STATUTES, AND CODES

Treaty Between the United States and the Arikara Tribe of July 18, 1825, 7 Stat. 259 5-6

23 U.S.C. §§ 204(j), 402 14

25 U.S.C. §§ 1301-1303 17

25 U.S.C. §§ 3601-3631 18

28 U.S.C. § 1332 6

Code of Laws of the Three Affiliated Tribes, Chap. 1, Sec. 8(c) 17

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. (1993) 18

S. Rep. No. 88, 103d Cong., 1st Sess. (1993) 18

H.R. 1268, 103d Cong. (1993) 18

S. 2747, 100th Cong. (1988) 18

S. 1752, 102d Cong. (1991) 18

Enforcement of the Indian Civil Rights Act: Hearing Before the United States Commission on Civil Rights, 100th Cong., 2d Sess. (1988) 18

EXECUTIVE MATERIALS

The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights (June, 1991) 18

TABLE OF AUTHORITIES – Continued

Page(s)

COURT RULES

N.D. S. Ct. Rule 7.2 19

OTHER AUTHORITY

Ralph J. Erickstad and James Ganje, *Tribal and State Courts – A New Beginning*, 71 N.D. L. Rev. 569 (1995) 19

Darby L. Hoggatt, *The Wyoming Tribal Full Faith and Credit Act: Enforcing Tribal Judgments and Protecting Tribal Sovereignty*, 30 Land & Water L. Rev. 531 (1995) 19

National Center for State Courts, *Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts* (1991) 19

ARGUMENT

For three separate and alternative reasons, the Tribe's court has jurisdiction, concurrent with the courts of North Dakota, to adjudicate this case. First, the case arose on Indian trust land which, while subject to an easement for a state highway, Congress has neither alienated from the Tribe nor otherwise divested from inherent tribal jurisdiction. *See, e.g., Montana v. United States*, 450 U.S. 544, 557 (1981); *Brendale v. Confederated Tribes and Bands*, 492 U.S. 408 (1989). Second, and quite apart from their authority to impose substantive rules of conduct, tribal courts have jurisdiction to adjudicate civil actions arising within their reservations, even if such claims arise on land which has been alienated from the tribe. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). Third, the Tribe has jurisdiction to adjudicate this case simply by virtue of its particularized interest in the outcome: both because the parties all have close, consensual ties to the reservation, and because respondents' allegedly hazardous driving on reservation roads falls within a category of tortious conduct that threatens the welfare of the reservation community.[1] *See Montana*, 450 U.S. at 565-566. Respondents have failed to refute any of these three independent grounds for reversal.

I. ABSENT EXPRESS DIVESTMENT BY CONGRESS, THE TRIBE RETAINS INHERENT CIVIL JURISDICTION OVER THE CONDUCT OF NON-INDIANS ON INDIAN LAND

Respondents and their *amici* improperly conflate two quite distinct categories of land within the territorial

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[1] Respondents assert that petitioner Gisela Fredericks was travelling in the wrong lane on the highway before the accident, Resp. Br. at 1, but they fail to acknowledge her argument that she was making a left turn across the lane toward her driveway when her car was hit by respondents' gravel truck.

boundaries of Indian reservations: 1) Indian land, which is owned outright by a tribe or its members or held in trust for them by the United States, and 2) non-Indian fee land or other land whose Indian title has been extinguished by Congress. As this Court has recognized, however, a tribe's interest in exercising its sovereign authority is at its zenith where Indian land is involved. *See Montana*, 450 U.S. at 557; *Brendale*, 492 U.S. at 438-444 (opinion of Stevens, J.) (announcing judgment of Court upholding tribal authority over "closed" Indian lands, as distinct from "open," largely alienated lands); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-331, 335 (1983). For that reason, a tribe's authority to govern non-Indian conduct on Indian land exceeds its authority to govern the same conduct on land which is no longer Indian land. *See Washington v. Confederated Tribes*, 447 U.S. 134, 152-153 (1980) ("Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. . . . "). That principle governs this case.

A. A Federal Grant of an Easement on Indian Trust Land to a State for Highway Purposes Does Not Divest Tribal Jurisdiction over Tortious Conduct by Non-Indians on the Highway

Respondents argue that the federal grant of an easement to the State to maintain a highway on Indian trust land divests the Tribe of "any and all rights, duties or control" over the highway. Resp. Br. at 34. Significantly, respondents cite no express statutory provision for this proposition. Rather, the premise of respondents' argument appears to be that, in granting the easement, Congress intended to divest the Tribe of its entire beneficial interest in the land on which the easement was granted. That premise is false.

With respect to Indian lands, Congress and this Court have long distinguished between grants of limited, non-Indian interests, such as easements, on Indian land and complete divestitures of tribal interests in Indian land. *See, e.g., Buttz v. Northern Pac. R.R. Co.*, 119 U.S. 55, 68 (1886) (Congress first "obtain[ed] from the Indians the right to construct railroads . . . across their lands . . . and afterwards . . . obtain[ed] a cession of their entire title" to the same lands). As *Buttz* makes clear, the two actions – granting a right-of-way and extinguishing title – are separate and distinct. This distinction is made largely because of the different jurisdictional consequences that attach to each action. *See United States v. Soldana*, 246 U.S. 530, 531-532 (1918).

It is undisputed that the highway in this case is situated on land held in trust for the Tribe and members of the Tribe. Because the Tribe retains its beneficial ownership of the land, the easement has no bearing either on federal protection or jurisdiction, *see United States v. Soldana*, 246 U.S. at 531-533, or on tribal sovereignty over the conduct of non-Indians, *see Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-144 (1982) (non-Indian lessees on tribal land are subject to taxation by the tribe); *Brendale*, 492 U.S. at 439-440 (opinion of Stevens, J.) ("the fact that nonmembers may now drive on these roads does not . . . undermine the Tribe's historic and consistent interest" in exercising regulatory authority over conduct on the surrounding lands); *cf. South Dakota v. Bourland*, 508 U.S. 679, 688-692 (1993) (curtailing tribal sovereignty with respect to land in which a tribe no longer has a legal or beneficial interest and over which the United States Army has assumed complete authority).

Respondents' *amici* base their contrary view on the contention that the Tribe cannot exclude non-Indians

from the highway. *E.g.*, States' Br. at 5, 15-17. That argument, however, confuses two distinct sources of tribal authority. A tribe's inherent sovereign powers and its treaty-guaranteed right to exclude non-Indians are each adequate and independent grounds for assertions of tribal authority over non-Indians. *Merrion*, 455 U.S. at 136-137, 141; *Brendale*, 492 U.S. at 425 (opinion of White, J.); *Brendale, id.* at 439-440 (opinion of Stevens, J.). This case involves a tribe's inherent sovereignty over conduct on unalienated Indian trust lands, not the interpretation of treaty rights that ensure a tribe's power to exclude non-Indians altogether. Indeed, this Court has explicitly affirmed that a tribe retains regulatory authority over the conduct of non-Indians on tribal land, even where it lacks or has forgone the right to exclude them. *Merrion*, 455 U.S. at 137-148; *see also Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 903 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992) (tribe may tax railroad on right-of-way through reservation), *cited with approval in Alyeska Pipeline Serv. Co. v. Kluti Kaah Native Village*, ___ F.3d ___, 1996 WL 668487, at *4 (9th Cir. 1996); *see also Bourland*, 508 U.S. at 691 (declining to reach the "ultimately irrelevant" treaty-based issue concerning a tribe's power to exclude because "the Army Corps of Engineers, not the Tribe," had assumed complete "regulatory control over the taken area").

The fact that the easement holder here is the State does not alter the proper analysis. With respect to Indian land, a state acquires only such rights and interests as have been specifically granted by Congress. *See County of Yakima v. Confederated Tribes and Bands*, 502 U.S. 251 (1992). Here the State was granted a limited easement to pave and maintain a 6.59 mile stretch of Highway 8 within the Reservation. It was not given exclusive authority to regulate conduct on that road. The Tribe's retention

of sovereign jurisdiction over tortious conduct on the highway is entirely consistent with Congress' limited purpose in granting the easement. In short, in granting the public access through Indian trust lands, Congress did not intend to, and did not need to, forever insulate the public from tribal court liability for negligent misconduct.

B. The Tribe's Treaties and Agreements with the United States do not Divest Tribal Civil Jurisdiction over Non-Indian Conduct on the Reservation

In their brief at pp. 14-23, respondents argue – for the first time in any forum – that the "historical record" of treaties and agreements between the Tribe and the United States shows Congress' express intent to divest the Tribe of jurisdiction over this case. This argument was neither raised in nor reached by the tribal courts, and therefore has not been exhausted pursuant to *Iowa Mutual*, 480 U.S. at 16-17, and *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985). Indeed, there are few matters more essential for a tribal court to review in the first instance than the proper construction of a tribe's own treaties and agreements with the United States. For that reason, and because respondents' "historical record" arguments were not presented to or passed on by the federal courts below, *see generally TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 444 (1993), these arguments are not properly before this Court.

In any event, respondents' historical arguments are untenable. The treaty and agreement provisions with the Tribe deal with what could only be equated with criminal jurisdiction over non-Indians – the Tribe's power to exact "revenge or retaliation" for "injuries done by individuals" – not civil jurisdiction over tort suits between non-Indians. *See* Treaty Between the United States and the

Arikara Tribe of July 18, 1825, 7 Stat. 259; *compare Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (tribes lack criminal jurisdiction over non-Indians), *with National Farmers*, 471 U.S. at 853-855 (refusing to extend the *Oliphant* rule or the *Oliphant* historical analysis to tribal court jurisdiction over civil litigation involving non-Indians). Moreover, even if these treaty and agreement provisions had some bearing on civil jurisdiction, which they do not, providing for federal assistance in obtaining redress would be entirely consistent with non-federal adjudicatory jurisdiction over civil cases. *See Iowa Mutual*, 480 U.S. at 17-18 (federal diversity statute, 28 U.S.C. § 1332, does not divest tribal courts of jurisdiction over reservation-based civil claims between tribal members and non-members); *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 150-151 & n.9 (1984) (even before enactment of Public Law 280, nothing in federal law barred North Dakota courts from adjudicating civil action brought by this Tribe against non-Indians).[2]

Despite respondents' contrary assertion, Resp. Br. at 15 & 23, it is irrelevant that Congress has never specifically granted the Tribe civil jurisdiction over cases involving two non-Indians. Inherent tribal sovereignty does not depend on a delegation of federal power. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Rather, the burden is on the party challenging inherent tribal sovereignty to show that Congress has expressly divested it.

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[2] Here, tribal jurisdiction is coextensive with that of North Dakota. *See* Opening Br. at 24; see also J.A. 63-64 (district court below implied that tribal jurisdiction is concurrent with state court jurisdiction). Petitioner Gisela Fredericks recently filed a similar action in state court to protect her rights against the running of the State's six-year statute of limitations, in the event that tribal jurisdiction is determined not to exist over her claims. *See* Resp. Br. at 8 n.6.

Iowa Mutual, 480 U.S. at 18; *Bourland*, 508 U.S. at 687; *see also County of Yakima*, 502 U.S. at 269 ("ambiguous provisions" of statutes should be resolved in favor of tribes).[3] As discussed above, respondents have not made that showing here. Also misconceived is respondents' contention (*see* Br. at 18 & n.15) that, until recently, the Tribe had not exercised its full jurisdiction over civil actions involving non-Indians. As this Court has held, tribes do not lose their sovereign powers through non-use. *See Merrion*, 455 U.S. at 148 ("sovereign power, even when unexercised, is an enduring presence that . . . will remain intact unless surrendered in unmistakable terms").

II. ALTERNATIVELY, EVEN IF THE SITE OF THE ACCIDENT WERE NOT INDIAN LAND, THE TRIBE RETAINS ADJUDICATORY JURISDICTION OVER THIS CASE

Even if the site of the accident in this case could be analogized to the lands wholly alienated from the tribes in *Montana*, *Brendale*, and *Bourland*, the Court of Appeals' decision should still be reversed for two independent reasons. First, this Court's precedents indicate that tribal courts have authority to exercise adjudicatory jurisdiction over civil actions involving non-Indians and arising on a reservation whether or not they also have the authority to regulate those non-Indians' conduct with substantive

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[3] Respondents are therefore incorrect (*see* Resp. Br. at 18-19) in asserting that the "parties' expectations," govern the jurisdictional analysis. *See also Merrion*, 455 U.S. at 147. Moreover, respondents, with their close contractual ties to the Reservation, were on clear notice that they could be held subject to tribal court jurisdiction, which, several years before the accident, this Court deemed "presumptively" appropriate in cases involving non-Indians and arising on a reservation. *Iowa Mutual*, 480 U.S. at 18.

rules. Second, and in any event, the circumstances of this case meet each alternative prong of the *Montana* "tribal interest test," which permits a tribe to exercise regulatory authority (and, *a fortiori*, adjudicatory jurisdiction) over non-Indian conduct on the reservation, "even on non-Indian fee lands." *Montana*, 450 U.S. at 565-566.

A. The Tribe Has Adjudicatory Jurisdiction over the Case Whether or Not it may Impose Tribal Law as the Substantive Rule of Decision

Respondents and their *amici* devote much of their argument to an issue that the Court has already resolved: the appropriateness of tribal courts as fora for adjudicating the rights of non-Indians on Indian reservations. In *Williams v. Lee*, 358 U.S. 217 (1959), the Court affirmed the exclusive jurisdiction of tribal courts to hear civil actions brought by a non-Indian against an Indian for matters arising on a reservation. The Court deemed it "immaterial" that the plaintiff whose rights were at stake in that case "[wa]s not an Indian." 358 U.S. at 223. What mattered, the Court held, was that the non-Indian "was on the Reser ation and the transaction with an Indian took place there." *Id.* Significantly, the Court based its decision in *Williams v. Lee* not on any showing of a particularized tribal interest in the outcome of that specific dispute, *cf. Montana*, 450 U.S. at 565-566, but on a categorical rule "guard[ing] the authority of Indian governments over their reservations." 358 U.S. at 223.

More recently, in *Iowa Mutual* and *National Farmers*, the Court required non-Indian parties who were defendants in reservation-based tribal court proceedings to exhaust tribal remedies before seeking federal court review of tribal jurisdiction. That exhaustion requirement would make no sense unless tribal courts actually have broad jurisdiction to resolve reservation-based disputes

involving non-Indians. *See National Farmers*, 471 U.S. at 854 ("If we were to apply the *Oliphant* rule here [barring tribal criminal jurisdiction over non-Indians], it is plain that any exhaustion requirement would be completely foreclosed because federal courts would *always* be the only forums for civil actions against non-Indians"). Thus, the Court logically based its decision in *Iowa Mutual* on the principle that, because "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty, [c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S at 18 (citations omitted); *accord National Farmers*, 471 U.S. at 854. This passage is not, as respondents contend, Resp. Br. at 27, "*dictum*," but an essential element of the Court's holding. Respondents correctly observe that, in some contexts, the Court has recognized limits on the power of tribes to impose substantive rules of conduct on non-Indians, whether through substantive regulation of their conduct on alienated lands, *see Bourland*, 508 U.S. at 688-692, *Brendale*, 492 U.S. at 426-428 (plurality opinion), *Montana*, 450 U.S. at 563-564, or through criminal prosecution, *see Duro v. Reina*, 495 U.S. 676 (1990), *Oliphant*, 435 U.S. at 197-212. Despite respondents' contrary view, however, these cases do not undermine the separate principle, affirmed in *Iowa Mutual*, *National Farmers*, and *Williams v. Lee*, that tribal jurisdiction to adjudicate reservation-based civil disputes involving non-Indians is presumed.

There are at least two reasons why a sovereign's inherent authority to adjudicate disputes among non-residents or non-members is often broader than its separate power to apply its own substantive rules of conduct

as the rule of decision.[4] First, unlike the power to regulate, which is often compromised by the need to avoid conflicts with another sovereign's laws, a sovereign's authority to offer a forum for the resolution of civil disputes arising within its territory is so integral to the definition of sovereignty that it has become one of "the most firmly established principles of personal jurisdiction in American tradition." *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990) (plurality opinion); *see also Iowa Mutual*, 480 U.S. at 14 ("Tribal courts play a vital role in tribal self-government").

Second, the interest of a non-resident or a non-member in avoiding the exercise of a sovereign's adjudicatory jurisdiction is much more attenuated than the separate interest in avoiding application of that sovereign's substantive laws. Thus, under due process principles, the contacts between a forum state and a non-resident litigant must be significantly greater to justify application of forum law than to justify a state's bare exercise of jurisdiction to resolve the dispute under, for example, the laws of the non-resident's own state. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-822 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). Similarly, state courts have expansive inherent authority to adjudicate disputes presenting issues that, under federal law, the states themselves could not substantively regulate through either positive or judge-made law. *See generally Tafflin v. Levitt*, 493 U.S. 455 (1990); *Testa v. Katt*, 330 U.S. 386 (1947).

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[4] While petitioner Gisela Fredericks is not a member of the Tribe, respondents misstate (*see* Br. at 1 n.2) her residency. The correct position is the one alleged by respondents themselves in their complaint in federal district court: Gisela Fredericks is indeed a resident of the Reservation. J.A. 42.

Hence, the distinction that respondents ask the Court to reject – a distinction between adjudicatory jurisdiction and the power to impose substantive rules of conduct – already pervades the Court's jurisprudence governing the proper role of state courts within the federal system. Likewise, the Court has viewed tribal adjudicatory jurisdiction over civil actions involving non-Indians as broader than a tribe's power to impose substantive rules of conduct on non-Indians. Indeed, this is one reason why there is no conflict between the Court's cases affirming broad tribal adjudicatory jurisdiction over non-Indians, *see Iowa Mutual, National Farmers*, and *Williams v. Lee*, and its separate decisions imposing constraints on a tribe's substantive power to regulate non-Indian conduct, *see Bourland, Brendale*, and *Montana*.[5] Here, because only the threshold issue of adjudicatory jurisdiction is presently before the Court, the adjudicatory jurisdiction cases govern the proper analysis. *See* Br. of United States at 21-22, 25 n.14.

B. The *Montana* "Tribal Interest Test" Standing Alone Justifies the Tribal Court's Exercise of Adjudicatory Jurisdiction in the Case

Even if a tribe's authority to adjudicate disputes were coextensive with its authority to impose substantive rules of conduct, the tribal court could exercise both forms of

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[5] Tribal court application of the substantive law of a given state would pose no threat to principles of state sovereignty. Although a tribal court's interpretation of state law might not be subject to review outside the tribal court system, it is similarly true that, when one state applies the substantive law of another state, the latter state has no opportunity to review the former state's interpretation of its law. *See generally Nevada v. Hall*, 440 U.S. 410 (1979).

authority in this case. Under *Montana*, tribes may substantively regulate (and, *a fortiori*, adjudicate disputes between) non-Indians, even with respect to non-Indian fee lands, pursuant to the Montana "tribal interest test." That test affirms a tribe's authority to regulate non-Indians either where they "enter consensual relationships with the tribe or its members," or where their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-566. Each prong of that test is met here.

The *Montana* tribal interest test is closely analogous to the due process inquiry governing whether a non-resident has sufficient contacts with a forum state to justify the application of that state's substantive law. Quite beyond the "minimum contacts" necessary to exercise personal jurisdiction, *see International Shoe Co. v. Washington*, 326 U.S. 310 (1945), a state may apply its own law in a judicial proceeding against non-residents only if it "ha[s] a significant contact or significant aggregation of contacts to the claims" of those non-residents sufficient to "creat[e] state interests" and to ensure that the choice of [forum] law is not arbitrary or unfair." *Shutts*, 472 U.S. at 821. The *Montana* tribal interest test accomplishes a similar objective: to ensure that substantive tribal law is imposed not necessarily on all non-Indians merely present on or passing through a reservation, but only on those who either "enter consensual relationships with the tribe or its members" or engage in conduct that threatens tribal well-being. *Montana*, 450 U.S. at 565-566.[6]

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[6] Without authority, respondents' *amici* argue that a consensual relationship must be express. *E.g.*, Br. of American Trucking Association, *et. al.*, at 14. But this Court has never equated the consensual relationship prong with a requirement of express consent. *See Montana*, 450 U.S. at 565; *see also Merrion*, 455 U.S. at 147 (consent "has little if any role in measuring the exercise of legitimate sovereign authority"). Nor does such a requirement make sense in the realm of tort law, since few tortfeasors expressly consent beforehand to the application of any particular sovereign's substantive laws or to any particular court's jurisdiction over their tortious conduct.

Similarly, respondents' *amici* argue that, after *Brendale*, a "direct effect" on tribal well-being can never "provide a basis for direct tribal authority over non-consenting nonmembers." States' Br. at 24-29. That is a misreading even of the *Brendale* plurality opinion, which did not command a majority of the Court. Properly read, the *Brendale* plurality noted that if a direct effect on tribal well-being sufficient to sustain substantive tribal regulation of a non-Indian's conduct is lacking, a tribe nevertheless may have other remedies by which to protect its rights, such as actions in the federal or state courts. 492 U.S. at 430-431. But the "direct effect" prong, which affirms a tribe's sovereign authority to take action on its own, remains a valid test. *See Bourland*, 508 U.S. at 695-696 (remanding for application of the direct effect prong).

This case fits squarely within each of these categories. With respect to "consensual relationships" with the Tribe, it is undisputed that respondents deliberately chose to contract with a tribal company to help develop a tribal community center on the reservation.[7] During their extensive dealings on the Reservation, respondents benefited from "the provision of police protection and other

[7] Respondents argue, Resp. Br. at 40, that the tribal court was somehow divested of jurisdiction over the underlying action in this case by a provision in the subcontract that, according to respondents, "provides for adjudication of disputes between A-1 and [the tribal company] under Utah law in Utah courts." Assuming that the subcontract is part of the record, *but see* J.A. at 111 n.5, the provision at issue is irrelevant to this case, which involves tortious conduct by respondents against third parties on the reservation, not a contractual dispute between respondents and the tribal company.

governmental services, as well as from the advantages of a civilized society that are assured by the existence of tribal government." *Merrion*, 455 U.S. at 137-138 (internal quotation marks omitted). Where an individual or company actively seeks out and benefits from tribal society, simple fairness suggests that it should be held accountable under generally applicable principles of tribal law. *See id.*

This case meets *Montana's* "direct effect" prong as well. *See* 450 U.S. at 566. This is not a tort action alleging conduct, such as the invasion of one non-Indian's privacy by another, that, viewed *ex ante*, never posed a direct threat to the well-being of the Tribe or its members. Nor is this a routine dispute between, for example, non-Indian residents of a reservation over a contract for work to be performed off the reservation. In such cases, a tribal court with adjudicatory jurisdiction over the dispute might lack a sufficient interest in the outcome to justify application of its own substantive law.

The tortious conduct in this case, by contrast – hazardous driving on reservation roads – imperils anyone present on these roads, Indians as well as non-Indians. Just as a tribe may enact reasonable ordinances ensuring the safety of such roads, *see, e.g., Confederated Tribes v. Washington*, 938 F.2d 146, 149 (9th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992), so too may a tribe enforce substantive safe-driving principles through application of its own tort law in the course of its adjudication.[8] Few rules of conduct are as integral to the well-being of any community as prohibitions on dangerous driving. Denying a tribe the

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[8] Congress has recently confirmed tribal authority over planning for, maintenance of, and safety on reservation roads. The Intermodal Surface Transportation Efficiency Act of 1991, 23 U.S.C. §§ 204(j), 402.

authority to enforce such prohibitions through positive or judge-made law would strip the *Montana* "direct effect" prong of much of its independent significance. In sum, even if the Tribe were required to demonstrate a particularized interest in the outcome of this case to justify its exercise of adjudicatory jurisdiction – a showing that no other sovereign need make in analogous circumstances and that this Court's precedents do not require – the Tribe has made that showing here.

C. Concerns for Judicial Economy Compel Upholding Tribal Adjudicatory Jurisdiction

As they must, respondents implicitly acknowledge, Resp. Br. at 42-44, that the *Montana* tribal interest test alone would sometimes permit a tribal court to apply substantive tribal law in reservation-based civil actions involving non-Indians. For that reason, even if respondents' narrow theory of tribal court jurisdiction were correct, the tribal interest test would also permit a tribal court to exercise adjudicatory jurisdiction over such cases. That fact illustrates why it would make little practical sense to bar a tribal court from exercising general adjudicatory jurisdiction over civil disputes between non-Indians arising out of conduct on a reservation.

Under respondents' approach, a tribal court presented with an action against a non-Indian would have to determine – as part of its threshold jurisdictional inquiry – whether the *Montana* tribal interest test is met. If so, a tribal court could exercise adjudicatory jurisdiction *and* apply substantive tribal law in resolving the action. If not, the tribal court would have to dismiss the case for lack of jurisdiction. By its nature, however, the tribal interest test is fact-specific. Questions may arise, for example, about the nature or existence of a non-Indian

defendant's contract with tribal parties, or about whether a non-Indian's tortious conduct posed (or poses) a safety threat not just to other non-Indians on the reservation, but to tribal members as well.[9]

In many cases, therefore, a tribal court could not conduct the preliminary tribal interest inquiry without also conducting a detailed inquiry into the merits of the parties' claims. Under respondents' approach, a tribal court that conducts such an inquiry and determines that the tribal interest test is not met would then have to dismiss the action altogether, thereby forcing the parties to relitigate their claims from the beginning in another forum. That result would be exceptionally wasteful. By contrast, if the tribal interest test is relevant only to a tribal court's choice of substantive law and not to its jurisdiction, a tribal court that deems the test unsatisfied would still be free to complete its resolution of the dispute under the law of another sovereign. Thus, because the facts relevant to the tribal interest test are generally also relevant to the merits of the parties' claims, this Court's principle that a sovereign's adjudicatory authority often exceeds its regulatory powers is the better means of conserving judicial resources, no less in tribal court actions than in state court litigation.

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[9] For example, respondents argue that the record is unclear about whether respondent Lyle Stockert was performing the subcontract when he was driving the gravel truck that collided with petitioner Gisela Fredericks' car. Resp. Br. at 40-41. Such a factual issue is relevant to the merits of claims and relief sought and may also be relevant to tribal jurisdiction under the tribal interest test.

III. THE INDIAN CIVIL RIGHTS ACT, THE PLENARY POWER OF CONGRESS, AND PRINCIPLES OF COMITY ASSURE THAT TRIBAL COURTS WILL ACT FAIRLY

Respondents' *amici* suggest that tribal courts "are inherently ill-suited to provide a fair and impartial forum for the adjudication of substantial tort claims against outsiders." Br. of the American Trucking Association, *et al.*, at 2.[10] This sweeping statement ignores this Court's observation ten years ago that challenges to tribal court competency to adjudicate reservation-based civil actions involving non-Indians contradict "congressional policy," *Iowa Mutual*, 480 U.S. at 19, and this Court's own repeated affirmations of tribal court jurisdiction over both Indians and non-Indians, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978).

As the Court recognized in *Santa Clara Pueblo*, tribal courts are bound by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, which guarantees, *inter alia*, the due process and equal protection rights of both Indians and non-Indians. 436 U.S. at 60-61; *see also National Farmers*, 471 U.S. at 856 n.21 (noting that exhaustion of the federal question of tribal court jurisdiction over non-Indians is not required "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to

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[10] Respondents make a similar allegation, and, in so doing, misread the Tribe's Law and Order Code regarding eligible jurors. Resp. Br. at n.9. The Code specifically provides that otherwise qualified 1) enrolled tribal members *and* 2) residents of the Reservation are eligible to serve on juries in the Tribal Court. Code of Laws of the Three Affiliated Tribes, Chap. 1, Sec. 8(c).

challenge the court's jurisdiction") (internal quotation marks omitted).

Since *Santa Clara Pueblo*, Congress and the Executive Branch have examined in depth the fairness and competency of tribal courts nationwide. *See* Enforcement of the Indian Civil Rights Act: Hearing Before the United States Commission on Civil Rights, 100th Cong., 2d Sess. (1988); The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights (June, 1991). In virtually every session, Congress considers legislation affecting tribal courts. *E.g.*, S. 2747, 100th Cong. (1988) (to provide federal court authority to enforce rights secured by the Indian Civil Rights Act); S. 1752, 102d Cong. (1991) (to provide for the development, enhancement, and recognition of Indian tribal courts); H.R. 1268, 103d Cong. (1993) (to assist the development of tribal judicial systems).

The most recent culmination of this process is the Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631 (1993), wherein Congress, rather than curtailing tribal court jurisdiction, authorized important additional resources for its effective exercise. *See also* Br. of United States at 4 (describing recent Department of Justice initiatives regarding tribal courts). In authorizing these resources, Congress acted on the premises, affirmed by this Court in *Iowa Mutual*, 480 U.S. at 18, that "tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals," S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993), and "that civil jurisdiction on an Indian reservation 'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.' " H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993). Of course, Congress is free to reverse course and do what respondents urge this Court to do: carve out exceptions to a tribe's

inherent, sovereign authority to adjudicate civil actions involving non-Indians. Congress has not done so, however, because there is no need for it to do so.

Further, a tribal court judgment against a non-Indian is rarely effective unless the successful plaintiff can persuade a federal or state court to enforce that judgment.[11]

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[11] North Dakota uses comity principles to enforce tribal court judgments. *Fredericks v. Eide-Kirschmann Ford*, 462 N.W.2d 164, 171 (N.D. 1990). To date, at least thirteen other states have addressed issues of enforcing tribal court judgments. *See* Darby L. Hoggatt, *The Wyoming Tribal Full Faith and Credit Act: Enforcing Tribal Judgments and Protecting Tribal Sovereignty*, 30 Land & Water L. Rev. 531, ns.11-14 (1995). In addition, nationwide efforts between tribal courts and state courts have focused on "cross-recognition of judgments, final orders, laws and public acts between tribal, state, and federal courts." National Center for State Courts, *Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts* 5 (1991). Significantly, one of the recommendations made in the *National Agenda* is that "[i]t should be a goal of all concerned for Indian tribes to have some jurisdiction, at their option and as their resources permit, over conduct in Indian country, whether by Indian tribal members, non-members, or non-Indians." *Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts* 5.

Following this national project, "[t]he North Dakota Supreme Court . . . sought and received direct funding from the State Justice Institute to establish a forum project in North Dakota. With the experiences of the previous forum projects to draw upon and with the shared goal of reducing conflict and achieving greater understanding, the North Dakota Tribal/State Court Forum was formed and began its work in January, 1993." Ralph J. Erickstad and James Ganje, *Tribal and State Courts – A New Beginning*, 71 N.D. L. Rev. 569, 573 (1995). The Forum proposed a tribal court order and judgment recognition rule that was adopted by the North Dakota Supreme Court in 1995. N.D. S. Ct. Rule 7.2.

Since most courts review tribal court judgments under the principles of comity applicable to the enforcement of foreign judgments, successful enforcement of tribal judgments generally requires a showing that the underlying tribal proceedings were full, fair, and non-discriminatory. *See Wilson v. Marchington*, 934 F.Supp. 1187, 1193 (D.Mont. 1996), *appeal docketed*, No. 96-35145 (9th Cir. Jan. 30, 1996); *see generally* Br. of United States at 6. That requirement, which is inapplicable to the enforcement of state court judgments, forecloses any concern that tribal courts are not up to the task that Congress and this Court have secured for them.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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